

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER OWEN HAMILTON,

Defendant-Appellant.

UNPUBLISHED
October 15, 1999

No. 204318
St. Clair Circuit Court
LC No. 96-000495 FC

Before: Gribbs, P.J., and O’Connell and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals from his jury trial conviction of one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, one count of conspiracy to commit assault with intent to commit murder, MCL 750.83; MSA 28.278 and MCL 750.157(a); MSA 28.354(1), and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to the mandatory two years for the felony-firearm, followed by concurrent terms of twelve to twenty-five years each on the other four convictions. We affirm but remand for partial correction of the judgment of sentence.

Defendant first contends that the trial court erred when it refused to allow three witnesses to testify that Mike Holmes, not defendant, was the shooter. We disagree. This Court reviews the trial court’s determination that a particular statement was not admissible by applying “a clearly erroneous standard in reviewing the trial court’s findings of fact and an abuse of discretion standard in reviewing the trial court’s decision to exclude the evidence.” *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

According to the separate record, Jennifer Hernandez would have testified that Holmes told her that he was the shooter; Donald Warshefski would have testified that Holmes told him that defendant was not the shooter; and lastly, Scott Babrack would have testified that an unidentified person told him

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

that neither defendant nor his codefendant, Anthony Seaman, were the shooters. Defendant asserts that the clear inference from Babrack's proposed testimony was that Holmes was the shooter.

After carefully reviewing the record, we agree with the trial court that Holmes' alleged statement to Warshefski was not against Holmes' penal interest as required by MRE 804(b)(3) because he did not admit responsibility for the shooting, but rather attempted to exculpate defendant. Further, Warshefski's credibility was suspect because he wrote defendant a letter informing him that he planned to testify and asking him to "Tell me what you want me to say for real, I'll help you all I can" We agree with the trial court that this suggests a lack of trustworthiness that is fatal to the statement's admissibility under MRE 804(b)(6) and MRE 803(24).

Similarly, the trial court properly refused to admit Babrack's testimony because, although Babrack claimed to know the identity of the shooter, he refused to disclose the person's name other than to say that it was not defendant, and refused to identify the declarant -- thereby preventing effective cross-examination and interfering with "the ascertainment of the truth." See MRE 611(a); see also *People v Poole*, 444 Mich 151, 160; 506 NW2d 505 (1993). The trial court correctly concluded that his refusal to provide details about the statement and the declarant made Babrack's testimony untrustworthy and therefore inadmissible under MRE 804(b)(6) and MRE 803(24).

The trial court's decision to exclude Hernandez' testimony is more troubling. According to Hernandez, Holmes admitted to her that he was the shooter, which was a statement against Holmes' penal interest. MRE 804(b)(3). Because the statement was offered to exculpate defendant, Hernandez' testimony was not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement." MRE 804(b)(3). On the other hand, because the statement was crucial to defendant's theory of defense, only minimal corroborating evidence was required. *Barrera, supra*, 451 Mich at 279.

We note that Holmes' statement to Hernandez was corroborated by evidence that there was only one shooter and that codefendant Seaman drove the getaway car. On the other hand, Holmes' statement that defendant was waiting with Seaman in the getaway car conflicts with eyewitness testimony that there was only one person in the car. Moreover, several eyewitnesses identified defendant as the shooter based on his height, build, and on the clothes he was wearing. Therefore, the question of whether there was sufficient corroboration to admit the statement was a close one. By definition, a trial court's resolution of a close evidentiary question cannot be found to be an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26, modified on other grounds 459 Mich 1275 (1999). Further, even if there had been an abuse of discretion, the error was harmless because we cannot conclude that, "in the context of the untainted evidence[,] . . . it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; ___ NW2d ___ (1999).

Defendant next contends that the prosecutor failed to use due diligence to produce an endorsed res gestae witness, Roman Holstein, who allegedly left the party with defendant, Holmes, and Seaman. We find that this claim of error is unpreserved because, although defendant moved to dismiss on this basis, the trial court reserved its ruling pending further efforts to locate the witness, and defendant failed

to renew his motion or otherwise request a ruling, and failed to move for a new trial or for remand. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Defendant has further failed to show that, but for this alleged error, the outcome may have been different. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Next, defendant argues that the trial court erred in refusing to grant his motion for a change of venue on the basis of pretrial publicity concerning Seaman's guilty plea. We again find that this issue has been waived because, although defendant moved for a change of venue, the trial court held its ruling in abeyance pending voir dire and, as before, defendant did not renew the motion following jury selection and, instead, expressed satisfaction with the jury. *Grant, supra*, 445 Mich at 551-553. We also note that our failure to review this issue will not result in manifest injustice because the court excused the only prospective juror who admitted hearing about Seaman's guilty plea. Compare *People v Jendrzewski*, 455 Mich 495, 499-500; 566 NW2d 530 (1997).

Defendant next contends that his sentence was disproportionate because of the disparity between his sentence and that of his codefendant, Anthony Seaman, who pled guilty and received no prison time. We disagree. We review defendant's sentence for abuse of discretion. *People v Houston*, 448 Mich 312, 319-320; 532 NW2d 508 (1995).

On the conspiracy and assault with intent to murder convictions, defendant's twelve year minimum sentence was within the guidelines' range and is therefore presumptively proportionate absent unusual circumstances. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). We note that "there is no requirement that the court consider the sentence given to a coparticipant." *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991). Additionally, we find that defendant's sentence was proportionate to his more serious role in the offense. *Jenkins, supra*, 438 Mich at 376-377. Lastly, we find no record support for defendant's allegation that he was punished for exercising his right to a jury trial. Compare *People v Miller*, 179 Mich App 466, 469; 446 NW2d 294 (1989).

However, the prosecutor correctly points out that the twelve to twenty-five year sentence imposed for the assault with intent to do great bodily harm conviction is invalid both because it exceeds the statutory maximum of ten years, and because it violates the two-thirds rule. See MCL 750.84; MSA 28.279; see also *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). We therefore remand with instructions to amend the judgment of sentence for that conviction to a term of six years and eight months to ten years, the maximum allowed by the statute. See *Thomas, supra*, 447 Mich at 392-394.

Affirmed and remanded for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns